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JAMES G. DAVIS, AGENT,

Petitioner,

versus

MRS. MARY KENNEDY, ADMINISTRATRIX,

Respondent.

REPLY BRIEF FOR RESPONDENT

October, 1928

W. R. NORVELL Jr.
Counsel for Respondent

[redacted]

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No. 371

In the Supreme Court of the United States

OCTOBER TERM, 1924

JAMES C. DAVIS, AGENT,
PETITIONER,

versus

MRS. MARY KENNEDY, ADMINISTRATRIX,
RESPONDENT,

REPLY BRIEF FOR RESPONDENT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

FIRST SPECIFICATION OF ERROR.

The first specification of error is that the Supreme Court of Tennessee announced that under the Federal Employers' Liability Act, an employee could not assume the risk of negligence of the defendant or of his fellow servants. (Petition, 8, 23, R., 246).*

*Page references refer to top paging of printed record.

Other Employees of Petitioner were Guilty of Proximate Negligence.

Petitioner asks no review of the facts found by the Supreme Court of Tennessee. From the statement of that court, as well as by the finding of the jury approved by the trial court and the intermediate court, it appears that the conductor, flagman and fireman violated the rules of the company and their duty and were negligent in permitting No. 4 to go on the single track without *knowing* that No. 1 had passed. (R., 249, 244, 242, 122, 121, 119, 111, 110, 52.)

The Supreme Court of Tennessee found that the defendant had recognized that *all* of the crew had duties to perform other than to look out for No. 1 and hence as a wise precaution placed that duty upon *each member* in order to avoid a *mistake.* (R., 242.)

It further expressly found, supported by the evidence, that if the engineer was negligent in not *knowing* No. 1 had not passed, *"the other members of the crew were necessarily negligent for the same reason."* (R., 249.) The Tennessee Court of Civil Appeals also found the jury was warranted in finding the operator or signalman at the shops or commencement of the single track to have been negligent in permitting the train to proceed onto this track. (R., 204-5.)

If any of these other three members of the crew had not been negligent, they could have angle-cocked, thereby stopping the train themselves, or pulled the train down, thereby notifying the engineer to stop

same, as same ran one mile and a half after getting out on the single track. (R., 207, 99, 52.)

So then, *it is now undisputed that at least three, if not four, other employees of the defendant were negligent.*

The most of the argument in the petition as to prejudice suffered under this specification is that "the danger of running No. 4 out on the main track before No. 1 had passed was so open and obvious and the result so certain that respondent's intestate assumed the risk of the danger resulting from the admitted negligence of the other employees in failing to observe that No. 1 had not passed and to warn him" or (we say) to angle-cock the train. (Petition, 28).

This statement presupposes that Kennedy *deliberately* and intentionally ran his train out on this single track when he *knew* (not simply should have known) that the incoming train with superior rights was then due. This Court has said, in a similar case, that however plain such a mistake might be "the jury reasonably might find it to be no more than a mistake attributable to mental aberration, or inattention, or failure for some other reason to apprehend or comprehend the order communicated to him." (*Spokane & I. E. R. Co.* v. *Campbell,* 241 U. S., 497, 508).

Petitioner's view *totally disregards* the effect of the finding of the jury and two State Appellate Courts and overlooks the rules that the burden of proving contributory negligence rests upon the de-

fendant (*Burke* v. *Street Railway Co.*, 102 Tenn., 409) and that where there is no direct proof of what happened (there being no direct proof here as to what happened in the cab of the engine after the train left the Union Station), the jury has a right to even find ordinary care in accordance with the presumption of the instinct of self-preservation having been obeyed by the deceased (*Railway Company* v. *Herb*, 134 Tenn., 397.)

It must be remembered that the only negligent act the petitioner charges against respondent's intestate is that of running out on the single track without knowing No. 1 had passed. It has never been contended that after the engineer got upon the single track that he could have seen No. 1 (at the place of the wreck, in time to have stopped and avoided a collision because it is undisputed he was just coming out of a deep cut, on a curve and where No. 1 would be so close before it could be observed that the trains could not be stopped in time at the speed they were travelling. (R., 143, 130, 129, 125, 107, and photographs filed with Jones' testimony).

An engineer has other duties to discharge than keeping a vigilant lookout ahead and it follows that the question of his contributory negligence in failing to keep such vigilant lookout is one of fact for the jury.

Central Railroad & Banking Co., v. *Kent*, 87 Ga., 402;

L. & N. Railroad v. *Hutt,* 101 Ala., 34;
Hall v. *Railway Co.,* 46 Minn., 439.

In the Literary Digest of February 14, 1920, page 86, there appeared an article in regard to a fireman stopping an express on the Philadelphia & Reading when the engineer was struck by some object while looking out of the window and became unconscious. Kennedy was an old and experienced engineer and such a thing may or may not have happened here; or, while performing some other duty, he may have explicitly depended upon his fireman to look out for No. 1. He had other engrossing duties to perform. (R., 242, 120).

Momentary forgetfulness of a known danger is not, as a matter of law, such negligence as will even, at common law, bar a recovery. See *Knoxville* v. *Cox,* 103 Tenn., 68.

Whether Kennedy was negligent or not is not the point as these other employees were negligent so that, under the Federal Statute, Kennedy's act not being the *sole cause* of the accident, there can be a recovery.

Grand Trunk W. R. Co., v. *Lindsay,* 233 U. S., 42, 47;

Illinois Central Railway Co. v. *Skaggs,* 240 U.S., 66, 69, 70;

Union Pacific Railroad Co. v. *Hadley, Admr.,* 246 U. S., 330, 333;

Pennsylvania Co. v. *Cole,* (C. C. A. 6th Ct.) 214 Fed., 948.

Railroad Co. v. *Heinig's Admrx.*, (Ky.) 171 S. W., 852;

Copeland v. *Hines* (C. C. A. 6th Ct.), 269 Fed., 361.

The facts in the Heinig case were quite similar to those in the case at bar (except here more co-employees were at fault) and the reasoning of the Kentucky Court, based upon decisions of this and other Federal Courts, is unanswerable.

Or, to conform to the holding in the last three cases, *supra*, the rule might be stated in another way to be that where the accident would not have happened if another employee or employees had done his or their duty, a recovery can be had.

Indeed, under the rule of comparative negligence established by the Liability Act, no degree of negligence, however gross or proximate, on the part of a servant (short of his act being *the sole cause*) will bar a recovery and the employer will be liable if any other employee or employees is guilty of any causative negligence, no matter how slight the negligence is in comparison to the negligence of the injured employee.

Pennsylvania Co. v. *Cole*, 214 Fed. 948;
N. Y. C. & St. L. R. Co. v. *Niebel*, (C. C. A. 1914), 214 Fed., 952.

The petitioner cannot avoid this rule of law by stating there was an "assumption of risk" any more than the defendant in the Lindsay case could nullify the

terms of the statute by calling the plaintiff's act "the proximate cause" (233 U. S. 47).

The person whose "want of care," together with the danger flowing therefrom, must be known and appreciated under the above rule is that of the employer or co-employees of the injured party, *not that of the injured party himself*. That is the vice in the argument in the petition on the first specification of error, which is devoted solely to a discussion of Kennedy's negligence (Petition, 24-30) and in the brief which is *devoted almost entirely* to the same point (Petitioner's brief, 15-18).

Petitioner confounds doctrine of contributory negligence of claimant (or here, deceased) with doctrine of assumption of risk and it states and cites no facts showng or relating to assumption of risk.

For instance, on page 18 of petitioner's brief, it is said:

> "When he (Kennedy) pulled out to the single track beyond the shops, the danger of that act and the inevitable consequences was so open and obvious that any person in the exercise of ordinary care would have known and appreciated the danger that existed."

As there was no allegation or contention of negligence as to the location or arrangement of tracks, or as to the operation of train No. 1, this is *only* a contention that Kennedy was negligent and that his negligence was *the sole cause of the accident*. Petitioner overlooks the distinction between negligence or con-

tributory *negligence* of the employee and his *assumption of risk* of the negligence of the employer or his fellow employees and has disregarded the warning as to avoidance of this confusion given by this court in the case of *Seaboard Air Line Ry.* v. *Horton,* 233 U. S., 492, 503-4.

In line with this same argument, petitioner cites, and quotes from, the recent case of *Frese* v. *C. B. & Q. Railroad,* 44 Sup. Ct. Rep. 1, (Petitioner's brief, 15-16, 18) and says, in this connection, that it was 'his (Kennedy's) *absolute, non-delegable duty* before leaving the double track to personally know that train No. One had passed and what others knew or might know never modified his obligation' (Petitioner's brief, 17). To this reliance upon the Frese case, we say that *said case is not applicable to the case at bar and is easily distinguishable therefrom* and, to this whole line of argument of Kennedy's negligence being the *sole cause of the accident,* we say that *petitioner made no such specification of error and this court will not, therefore, consider this point.*

Frese Case is not Applicable to the Case at Bar and is Easily Distinguishable Therefrom.

In the Frese case, the statute laid the duty *solely* upon the engineer of *positively* ascertaining that the crossing was clear or the draw bridge closed. (44 Sup. Ct. Rep. 2; U. S. S. C. Adv. Opinions Nov. 1, 1923, 1-2). No duty was laid upon the fireman and this Court rejected the idea that Frese's administratrix could recover simply because the fireman, *upon whom*

no duty was laid, might, perhaps, have seen the other train and caused the accident to be avoided.

In the case at bar, the duty of looking out for No. One was not laid SOLELY upon the engineer but upon ALL *the members of the train crew alike.* (R., 242, Petitioner's statement of case, 7).

> *This system placed a heavy responsibility and duty upon each member of the train crew. This duty to recognize train No. 1 was upon the conductor, engineer, fireman and flagman.* All of these men obviously had other duties to perform."

This case is, therefore, not governed by the Frese case but by the cases of *Union Pacific Railroad Co.* v. *Hadley, Admr.,* 246 U. S., 330, 333; *Pennsylvania Co.* v. *Cole,* (C. C. A. 6th Circuit) 214 Fed., 948; *Copeland* v. *Hines,* (C. C. A. 6th Circuit) 269 Fed., 361, etc.

The Frese case cites and is bottomed upon the case of *Great Northern R. Co.* v. *Wiles,* 240 U. S., 444. The Hadley case, where if the deceased brakeman had not violated his *non-delegable duty* of protecting the rear of his train, he would not have been killed, distinguishes the Wiles case, *from this line of cases where others violated duties,* saying in that case "it appeared that the *only negligence* connected with the death was that of the brakeman who was killed" (246 U. S., 333). In response to the argument of the railroad that the brakeman's negligence in the Hadley case was the *only proximate cause,* the same argu-

ment here made by petitioner, this Court said (246 U. S., 333):

> "But even if Cradit's negligence should be deemed the logical last, *it would be emptying the statute of its meaning to say that his death did not 'result in part from the negligence of any of the employees of the road.'*"

In this connection, it must not be forgotten that, as shown, *all the other members of the crew* were likewise negligent in not knowing that No. One had not passed and in, therefore, not angle-cocking or otherwise stopping the train.

Failure to prevent an accident or injury is an efficient and proximate cause.

Deming v. *Merchants Cotton-Press Co.*, 90 Tenn., 306, 353;

Postal Telegraph Cable Co. v. *Zopfi*, 93 Tenn., 369.

The Petitioner not Having Assigned as Error that Kennedy's Negligence was, Under the Law, the Sole Cause of the Accident, this Court will not Consider that Point.

The petitioner, in the Supreme Court of Tennessee, in addition to some complaint about alleged errors in charge of trial court, specified and assigned as errors committed by the Court of Civil Appeals first, that said Court erroneously found other employees of the petitioner were guilty of proximate negligence; second, that said court erroneously found that the deceased did not assume the risk of said negligence and,

third, that the verdict was excessive. (R., 229-231, 232-235). The petitioner here has abandoned the first and third grounds and only specifies as error, in addition to the failure of the trial judge to use the word "compensation" in his charge, a broad and general announcement by the Tennessee Supreme Court of the principle of law that in a suit under the Federal Employers' Liability Act, the employee could not (in any such case) assume the risk of the negligence of the employer or his fellow servants (Petition, 23; Petitioner's brief, 12). Evidently realizing *now that* such specification of error did not permit such a point to be raised, petitioner, in its brief (p. 19) completes its argument on this point by *first* reciting the error specified, and then saying:

> "Second. Under the undisputed facts and under the statement thereof contained in the decision of the Supreme Court of Tennessee recovery cannot be had for Kennedy's death simply because some of his subordinates and associates might have prevented the accident if they had done more."

Where a case is considered on certiorari, just as upon appeals and writs of error, the whole record is not thrown open for review and this Court *only examines errors assigned by the petitioner.*

Hubbard v. *Tod,* 171 U. S., 474, 494;

Montana Min. Co. v. *St. Louis, etc., Co.* 186 U. S., 24, 31.

To the same effect is rule 21 of this Court with the exception that the Court may, at its option, notice a *plain* error not assigned or specified. This is not a *plain* error; indeed, it is no error at all and, further, it must be remembered that certiorari cases are not considered by this Court as a matter of right and the writ is only granted "in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties." See *Layne & Bowler Corporation* v. *Western Well Works,* 261 U. S., 393.

The petitioner, in its brief on the first specification of error (pages 13-19) cites no authorities and no facts *showing knowledge by the deceased of negligence of his co-employees* (or of the petitioner) and, hence, this specification of error must fail. Its discussion relates solely to another principle of law, as shown, and has nothing to do with the question of *assumption of risk.* However, as we are confident that a full examination of the record, *under the verdict of the jury,* shows no assumption of risk of any fellow employee's negligence, *without waiving our objection* to the Court's considering this point under the state of the record, *i. e.,* errors as specified and shown, we briefly mention the applicable law and refer to the record and the facts on the question of the *correct* doctrine of assumption of risk.

There was No Assumption of Risk in this Case Because No Knowledge by Kennedy of the Negligence of His Co-Employees.

While under the Employers' Liability Act, negligence of co-employees may be an assumed risk, yet

this is only where the negligence was, in fact, *known to the plaintiff or was so customary that he must be charged with knowledge and, also plaintiff must appreciate the danger.*

Michigan, etc., Railway Co. v. *Schoffer,* (C. C. A., 6th Circuit), 220 Fed., 809, 813;
C. & O. R. Co. v. *De Atley,* 241 U. S., 310, 315;
C., R. I. & P. Co. v. *Ward,* 251 U. S., 18, 21-22.

Petitioner cites no proof, and there is no proof, showing, or tending to show, that Kennedy had *any reason* to know or believe that the flagman and the fireman would not, on this trip, look out for No. 1 and warn him or angle-cock the train if need be, nor that they had *ever* failed to look out for No. 1.

The only testimony intimating any possible knowledge by the engineer that any member of the crew might, at any time, not have been on the lookout for No. 1 appears in the cross-examination of Eubanks, the conductor (who was in the employ of the petitioner at its shops and being the only accessible surviving member if the crew was called by the respondent as a witness) (R., 65). Eubanks' answers to petitioner's questions were evidently not satisfactory as the matter was not pursued, so that the record was there left in *imperfect* shape on this point and the testimony is *somewhat ambiguous and uncertain.* But a fair inference therefrom is that on one or more occasions, *previous* to this occasion, Eubanks had specifically requested Kennedy to look out for No. 1 for him 'that morning,' that there was no regular custom of this kind however and that as the

conductor did not make this specific request on other mornings, including the morning in question, Kennedy had the right to believe that Eubanks did not expect him on this morning to look out for him and, hence, he did *not assume the risk* of the conductor's negligence. This issue was *squarely* submitted to the jury upon special request of petitioner (R., 186) and the jury, by its verdict (R., 2), found against the petitioner.

Under both the Federal and State rule, *this settled the question of fact.*

Richmond & Danville R. R. Co. v. *Powers,* 149 U. S., 43, 45;

Rapid Transit Co. v. *Seigrist,* 96 Tenn., 119, 124-125.

Any intimation or statement that Kennedy knew, or had cause to know, that the conductor would not be on the lookout for No. 1 *that morning* and, hence, he assumed the risk of such omission of negligence is inadvertent, *plainly* contrary to the finding of the jury under proper instructions and, hence, *must be disregarded.*

Indeed, that the jury correctly found that Kennedy had no reason to believe that Eubanks or any other member of the crew would fail to look out for No. 1 that morning, and hence did not assume any risk of their not doing so, is seen from Eubanks' clarification, on re-direct examination, of his former uncertain and ambiguous testimony when he said in regard to the custom as to looking out for passage of trains, etc., when his train was crowded:

> "I think it is the custom for *us all* to look out when we are crowded that way, for any member of the crew." (R., 73).

The Court of Civil Appeals, in affirming on this issue, *appreciated the correct rule of law,* under the Liability Act, on the assumption of risk of negligence of fellow servants. (R., 208). If it is permissible to say so, the respondent *never has contended otherwise* and the Court of Civil Appeals quoted the law and the authorities there set forth from respondent's brief in that Court.

Under the facts, the Supreme Court of Tennessee was correct in stating that both under the law and the *evidence,* the engineer did not assume the risk. (R., 251).

In view of the above, it is immaterial whether or not language used by the Judge who delivered the opinion of the Supreme Court of Tennessee in another portion of the opinion properly bears the construction contended for by petitioner, *i.e.* that the doctrine of assumption of risk is abolished by the Employers' Liability Act, because such a situation is ruled by the case of *St. Louis & San Francisco Railroad Co.* v. *Brown,* 241 U. S., 223, 227-8, in which this Court *declined to reverse on writ of error* the Supreme Court of Oklahoma in an Employers' Liability case where that Court flatly announced that the doctrine of assumption of risk had been abolished. However, the question of fact had been submitted to the jury in a trial court under charge not here complained of, and this Court said:

> "At best, therefore the error asserted simply amounts to contending that *because the court below may have inaccurately expressed in one respect its reasons for affirmance, that inaccuracy gives rise to the duty of reversing the judgment although no reversible error exists.*"

See also *Seaboard Air Line Railway* v. *Moore,* 228 U. S.. 433, 435, where the Circuit Court of Appeals for the Fifth Circuit was seemingly guilty of the same inadvertent statement.

The quotation from the Brown case squarely fits petitioner's first specification of error and, hence this Court will disregard same. The function of this Court is not to correct erroneous statements of law in an *opinion,* but to review errors committed in the *proceedings.*

II.

SECOND SPECIFICATION OF ERROR.

The second specification of error is that the Supreme Court of Tennessee erred in holding that it was harmless error for the trial court to omit the word "compensation" in charging the jury as to damages.

Failure of Trial Court to Use Word "Compensation" in Charge to Jury not Error.

The trial court, after reciting the proper facts to be considered by the jury in assessing the damages, instructed them "to make such pecuniary allowance therefor as in your opinion is warranted by the evi-

dence. In no event should your verdict exceed the amount sued for in the declaration." (R., 185, 195-6, 249).

The objection thereto, taken when motion for new trial was filed, was simply that the jury were nowhere limited to "compensation." (R., 196). So that if the jury had been instructed at the conclusion "to give such compensation therefor as, in your opinion, is warranted by the evidence " or "to allow compensation therefor in such amount as is warranted by the evidence," there would have been no objection and yet, what difference is there in the sense of these several statements and in the understanding that the jury would have thereof?

The Supreme Court of Tennessee (R., 250-251) did not state whether the Federal or State law should control in measuring this question but held that this charge did not prejudice the defendants, and "while not strictly correct, there was *no evidence* in the record which tended to show that the verdict was in excess of the pecuniary loss sustained by the beneficiaries" and that the jury were well warranted in awarding that amount.

As to whether or not, in such a situation, the Appellate Court should reverse was a question of practice. Clearly, under the State rule, the Supreme Court committed no error in not reversing.

Thompson-Shannon's Code, § 4902a-1;
Acts of 1911, chap. 32;
Compress Co. v. *Insurance Co.,* 129 Tenn., 586, 597.

This statute reads (in the relevant part) "No verdict or judgment shall be set aside or new trial granted by any of the appellate courts of this state, in any civil or criminal cause, on the grounds of error in the charge of the judge to the jury * * * unless, in the opinion of the appellate court to which application is made after an examination of the entire record in the cause. it shall *affirmatively appear* that the error complained of has affected the results of the trial."

Under the Federal practice, an exception to any portion of the charge must be specific and is of no avail unless taken before the jury retires (*Pacific Express Co.* v. *Malin,* 132 U. S., 531, 538) and the reason for this is, of course, that the trial judge may then and there consider the exception and have an opportunity to give new and different instructions if he should then deem it proper to do so. Under the Tennessee practice there is no exception taken until the motion for new trial is made, after the jury has brought in its verdict. Hence, it is quite fitting that the rule announced by the Act of 1911 should prevail for, if parties are permitted to wait until some time after the verdict to go over the record and then critically examine same for exceptions, without any opportunity for the trial judge to have set himself right before the jury at the trial, the complaining party should be forced to show that he was, in fact, prejudiced.

The *practice* in an action in a State court under

the Federal Employers' Liability Act is regulated by the law of the forum.

Chesapeake & Ohio Railway Co. v. *De Atley* 241 U. S., 310, 317.

This we believe fully answers the second specification of error, but to go further, may say if the question of proper measure of damages is inseparably connected with the right of action and must be settled by the Federal law. (*Chesapeake & Ohio Railway Co.* v. *Kelley,* 241 U. S., 485, 491), a reading of charges approved by the Federal and many other courts shows that the use of the word *"Compensation"* is not necessary, but the Court can use any appropriate language conveying the idea of making pecuniary allowance warranted by the evidence for the damages or injury *flowing* or *resulting* from the negligence of the defendant.

Chesapeake & Ohio Railway Co. v. *Carnahan,* 241 U. S., 241, 243;

Southern Pacific Co. v. *Cavin,* 144 Fed., 348, 75 C. C. A., 350;

Railway v. *Otto,* 52 Ill., 416;

Munro v. *Pacific Coast, Etc., Co.,* 84 Cal. 515.

In the Carnahan case the trial court, on the measuse of damages, instructed the jury as follows:

> "The Court instructs the jury that if they believe from a preponderance of the evidence that defendant is liable to plaintiff in this action, then in assessing damages against the defendant, they may take into consideration the pain and suffering of the plaintiff, his mental anguish, the bodily injury sustained by him, his

> pecuniary loss, his loss of power and capacity for work and its effect upon his future, not however, in excess of $35,000.00, *as to them may seem just and fair.*"

It is to be noted that this instruction apparently gave the jury more latitude, by its verbiage, than did the instruction complained of in the instant case. This court, in affirming, held that this instruction was not objectionable as leaving the amount of damages to conjecture without regard to the evidence, where the Court explicitly enjoined upon the jury that there must be a proximate and casual relation between the damages or injuries and the defendant's negligence.

In the instant case, the lower court repeated several times the language of the Act that the injuries or death must have *resulted,* in whole or in part, from negligence of the carrier; that said negligence, in whole or in part, must have been the cause of the injury and death of David Kennedy before the plaintiff could recover (R., 184, 185) and at the request of the defendants explicitly charged:

> "I charge you that an injury which is the natural and probable result of the act of negligence is actionable and (when?) such act is the proximate cause of the injury."
> R., 186.

The question of liability being determined, the damages or injuries to plaintiff arose solely from the death and the *elements* were properly stated and her damages were expressly limited to those *"warranted by the evidence"* and the charge was not erroneous,

particularly, in the absence of request for further instructions.

The Tennessee case of *Railroad* v. *Witherspoon,* 112 Tenn., 128, which reversed the lower court for failure to use the word "compensation" in the charge, has been considerably limited by the decision of the Court of Appeals in *Telephone Co.* v. *Carter,* 1 Tenn., C. C. A., 750, 771-7, (writ of certiorari denied by the Supreme Court of Tennessee) which sustained a charge where the word "compensation" was not used. The Supreme Court of Tennessee has, indeed, *squarely* passed from the position which petitioner says it took in the Witherspoon case, i. e., that the word *"compensation"* in a charge as to measure of damages is a *sine qua non,* because in the case of *Atkin* v. *Shenker,* 4 Tenn., C. C. A., 298 it denied writ of certiorari. In that case, the complaint was made that the trial judge did not use the word "compensation." He did give the elements of recovery (*as in the case at bar*) and then told the jury to assess the damages in such amount as "the plaintiff was justly entitled to recover." The Court of Civil Appeals stated that the term *"compensation"* 'is an expression used in the law, but need not be given to the jury *haec verba.*' The holding is succinctly set forth in the fifth head note as follows:

> "It is not error for the trial judge to omit from his instructions the word *compensation* if it is apparent that the jury understood that they were instructed to award a plaintiff such sum as the *proof showed he was entitled to.*"

The Supreme Court of Tennessee, by refusing is-

suance of writ of certiorari in the case of *International Corporation* v. *Wood,* 8 Tenn., C. C. A., 10, 28, has also heretofore adopted the rule that there should be no reversal for an erroneous instruction as to damages where it was apparent that no more than fair compensation was awarded and, it may be said, the Wood case was a personal injury case.

In the Tennessee cases cited on page 21 of Petitioner's brief, no one of them relates to the use of the word "compensation" in a charge except the Witherspoon case. The others were cases of *positive, affirmative error* in charges not relating to the measure of damages except, in the case of *Jones* v. *State,* 128 Tenn., 493, 498, a murder case, where the judge *omitted* to charge on second degree murder and our Supreme Court held that the effect of our statute was to require such charge in all murder cases.

In view of later action of the Supreme Court of Tennessee, as shown above, it is to be noted that the Supreme Court in the instant case (R., 250) did not hold that there was positive error but simply said, in regard to the conclusion of the portion of the charge relating to damages, that it was objectionable and in strictness incorrect.

While the idea or theory of compensation permeates the Federal Liability cases cited by petitioner, *yet NONE of them held that a lower court was in error for failing to use the word "compensation."*

But even if the Federal rule as to *practice,* which it does not, prevails and a strict rule requiring the use

of the exact word "compensation" governed, yet we must remember that the Federal rule of practice is that any error is not sufficient for reversal if the record discloses no injury resulted therefrom.

West v. *Camden,* 135 U. S., 507;
Carlisle Packing Co. v. *Sandanger,* 259 U. S., 255, 259.

And here the Tennessee Supreme Court found that not only "was the verdict not in excess of the pecuniary loss sustained, but also the evidence tended strongly to show that the beneficiaries sustained *at least* this pecuniary loss and the jury was well warranted in finding this amount." (R., 250.)

Petitioner says it *'asks no review of the facts'* (Petition, 7). The Supreme Court of Tennessee has found the jury was *well warranted* in finding this amount; in other words, that *no injury* resulted to petitioner and, hence, *under the very authorities cited by petitioner,* this Court will not reverse for the failure of the trial judge to use the word *"compensation,"* even if this omission were error and the Federal practice prevails. The Supreme Court was entirely correct in this statement as the *undisputed* evidence showed that the decedent was earning $3,000.00 a year, was an extraordinarily vigorous man for his age, had never been sick, his expectancy of life was quite great, his family consisting of a wife (stone deaf), two daughters and a son, received practically all he made and he was greatly interested in and gave the best care and advice to his family. (R., 81, 78, 106, 118, 180, 24, 25, 26.)

The Carlisle table (R., 180) shows average expectancy at this age to be 8.16 years and with Kennedy's extraordinary vigor he would have probably lived eleven or twelve years longer.

CONCLUSION.

This case is now being heard six years after Kennedy's death. If entitled to a recovery, Kennedy's administratrix should *now* receive same. She is entitled to the recovery given by the jury because, first, there was no error at any time warranting a reversal or dismissal and, second, there is certainly no error *here* claimed and specified that this Court will reverse for under the well settled principles of substantive law and practice heretofore announced by it.

Therefore, it is submitted that the case should not be reversed, but writ of certiorari should be dismissed.

Respectfullly submitted,

W. E. NORVELL, JR.

October 1924.

Counsel for Respondent.